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No. 89-148

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

SUZUKI MOTOR CO., LTD. AND
U.S. SUZUKI MOTOR CORPORATION,
Petitioners,

v.

DONALD G. RICHARDSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Where, after jury special verdicts of patent validity and infringement, the district court in the belief the verdicts were advisory also found the patent valid and infringed, did the United States Court of Appeals for the Federal Circuit, in affirming both the judgment on the jury's verdicts as well as the district court's findings, and in refusing the vacate the district court's denial of j.n.o.v., violate the Seventh and Fifth Amendments or the Federal Rules of Civil Procedure?

2. Where a contract gave petitioner an option to license respondent's patent and obliged respondent to confidentially disclose to petitioner his "proprietary technical information, know-how, inventions and use data" and petitioner was obligated to keep said information confidential, not to use said information except for evaluation purposes, and to return same to respondent if petitioner did not exercise its option, and the jury found that (a) two items of technology so disclosed were trade secrets of respondent not disclosed by the patent, (b) petitioner later applied for its own patents in the knowledge that respondent first disclosed to petitioner the invention therein, (c) petitioner had fraudulently induced respondent to reveal his trade secrets by concealing petitioner's decision not to exercise the option, and (d) petitioner fraudulently concealed the fact of its instituting production of the infringing motorcycle with the intention of not exercising the option but nonetheless using respondent's trade secrets in the later patents, did the United States Court of Appeals for the Federal Circuit, by ordering on equitable grounds an assignment to respondent of petitioner's patents on the trade secrets despite the district court's clearly erroneous refusal to do so, violate the Fifth and Seventh Amendments or the Federal Rules of Civil Procedure?

3. Where the district court by clear error of law abused its discretion in granting a new trial on trade secrets, did the reversal by the United States Court of Appeals for the Federal Circuit improperly interfere with the district court's discretion, violate regional circuit jurisprudence, or amount to improper fact-finding?

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

Richardson does not believe the partial transcript of the proceedings on May 11, 1987 (Petitioner's Appendix C)[1] is a statement of an "oral opinion" of the district court or a fair or complete presentation of what occurred at that post-trial hearing. It consists largely of the district court's preliminary "observations" and "initial views" which were "subject to argument". It also omits significant portions of the proceedings which illustrate the district court's disregard of the jury verdict was based upon its erroneous view of the law. In the interest of clarity, the Court is referred to the nearly

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[1] Hereafter, references to Suzuki's Petition will be made as [Pet.Page No.].

complete transcript appearing at A9073-A9121.[2] If this is to be considered at all, this should be considered in its entirety.

JURISDICTION

Richardson adds that jurisdiction is also based upon 28 U.S.C. 1338(b). This civil litigation involves not only a patent but a claim of unfair competition.

STATUTORY PROVISIONS INVOLVED

Suzuki omits 28 U.S.C. 1338(b), and Fed.R.Civ.P. 49(a), governing special verdicts. These provisions, as well as 28 U.S.C. 1292(b) and 35 U.S.C. 232 are shown in Appendix I hereto.

RESPONDENT'S ADDITIONAL STATEMENT OF THE CASE

(1) Suzuki says the Richardson '332 patent, issued in 1975, covers a "motorcycle suspension system with its parts arranged in such a manner as to produce a 'rising rate'". [Pet.3]. This shorthand description of the invention leaves the impression that the patent covers any motorcycle suspension system with "parts" (undefined) arranged to produce a "rising rate". Richardson did not try to patent the phenomena of "rising rate" nor did he claim every means by which a rising rate is produced. His invention was very specifically a system including "a single shock absorber plus a linkage consisting of a bell crank and connecting rod. This linkage generated a rising rate -- a characteristic critical to the issue -- and produced a far superior ride, even as it eliminated the dangerous 'bottoming out'." [3a].[3]

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[2] References to the Appendix of the Court of Appeals will be made as [A Page No.].

[3] References to the contents of Suzuki's Petition Appendix will be made as [Page No.a].

(2) In October 1978, Suzuki was sufficiently interested in Richardson's patent and the potential for manufacture, sales, and sub-licensing it and any of Richardson's later developed technology that it entered into a written option and license agreement [A1058-67] with Richardson whereby Suzuki was given a one year option to take an exclusive license under the patent and "proprietary technical information, know-how, inventions, and use data", collectively defined in the agreement "Licensed Rights" (Pet.6a), which provided that if Suzuki elected to exercise the option, it could use the licensed rights commercially and would pay royalties to Richardson. Otherwise, Suzuki was to hold the information in confidence and return it to Richardson if the option was not exercised.

(3) Suzuki states that in mid-1979, its competitor, Kawasaki, announced production of a suspension system "that Richardson described as structurally identical." [Pet.4]. While Kawasaki's 1979 system may have infringed claim 1 of Richardson's patent, it fell far short of equating with Richardson's trade secrets or infringing claim 9: the linkage did not produce a rising spring rate characteristic [A1382; A3152]. In fact, Suzuki's own expert admitted that the early Kawasakis had a falling, not a rising, rate and "had a major problem" [A4268-9]. Kawasaki's announcement was not discouraging to Suzuki -- rather, it spurred Suzuki to accelerate its effort with Richardson [A1326].[4]

(4) Suzuki omits mentioning that under the 1978 contract, Suzuki, not Richardson, had the right to bring suit against Kawasaki for infringement. [A1065; Intro.; A1066; Para.19]. Suzuki decided in mid-October, 1979, not to sue Kawasaki [A1337], filed its own patent application on the Alternate Shock Mount claiming that one of its own engineers, Mr. Tamaki, was the inventor [A1550], started openly discussing infringing the Richardson patent, like Kawasaki, and

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[4] In 1982, Kawasaki commenced infringement of claim 9, was sued by Richardson, and settled before trial.

challenging validity. [A1338-9]. Having already obtained one extension from Richardson, concealing its foregoing actions and decisions, Suzuki on October 30, 1989, wrote Richardson stating that it wanted his assistance and input regarding the filing of a patent infringement lawsuit against Kawasaki [A1542], that it needed a second extension of the option period from Richardson to conduct tests, make a decision and obtain approval to transmit more funds to Mr. Richardson under the terms of the Contract. [A1541]. The next funds payable would have been the option exercise fee, $30,000. [A1266, Para. 10]. At that time, Suzuki had not quite completed final testing of what it then already labelled "Full Floating" using Richardson's trade secrets.[5]

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[5] From December 1 to 4, 1979, Suzuki successfully tested the Richardson Alternate Shock Mount, and the final report was prepared December 5, 1979. [A1342]. On December 7, 1979, instead of instructing Suzuki U.S. to formally exercise the Contract Option, Suzuki Japan instructed Suzuki U.S. to terminate the relationship with Richardson. Suzuki U.S. responded, saying:

> When we terminate the present dealing at this time (in the middle of the option period) ignoring Don's will completely (he will think so), and furthermore, when we, SUZUKI, develop a suspension which has the same idea (same kind) with respect to a patent (we think this point has to be brought up as a reason for termination) how are you, Head Office, going to deal with a retaliation by the Don's side (if there is any) resulting from our past relationship (the production of the prototype model, observation of the testing, disclosures of various materials, etc.)?

Suzuki U.S. further noted that there were "similar troubles" twice before and attempts to invalidate a patent were unsuccessful. [A1347]. Head Office responded four days later, telling Suzuki U.S. to advise Richardson that "we decided to cancel the testing at the Head Office," acknowledging that "there may be some friction" but that "we don't think the situation will get serious"; that U.S. favoring of U.S. patents does not extend to "developing countries" and that "it is not too late to renegotiate when the validity of Don's patent is put in order." [A1349]. On December 18, 1979, Head Office instructed Suzuki U.S. not to tell Richardson about the "new mono shock" or the Japanese patent application Suzuki had already filed [A1352], because this would "cause trouble." A Suzuki director characterized its own dealings with Richardson as "primarily crafty" (plaintiff's translation) [A1357] and "too sharp" (Suzuki's translation) [A1358].

(5) Richardson learned of Suzuki's decision not to exercise the Option on December 24, 1979. Richardson was not advised of the existence of the Full Floater until April, 1980. [A800, Para. 42]. Richardson sued in state court on contract within weeks in 1980 and obtained a preliminary injunction. [A1202-6]. Despite the injunction, Suzuki introduced the Full Floater on the market, publicly disclosed Richardson's trade secrets, and filed its own action in the district court and stayed the state court action. In 1982, Richardson filed a district court infringement action which was consolidated with Suzuki's action.

(6) Suzuki states that it "developed" the "Full Floater" suspension and therefore owed Richardson nothing. [Pet.4]. In Suzuki's own words, the Suzuki "Full Floater" is "identical" and the "same idea" as Richardson's Alternate Shock Mount [A1341-3; A1347; 8a; 64a at C2-3]. The jury found that the design modifications enabling extended rear wheel travel in a single shock linkage generated rising rate rear suspension (Trade Secret No. 5) and the Alternate Shock Mount (Trade Secret No. 6) were Richardson's trade secrets, were misappropriated by Suzuki [58a-60a] in a fraudulent manner [63a], and utilized by Suzuki in the "Full Floater" motorcycle [64a]. The jury found that the Tamaki patent application was filed by Suzuki with the knowledge that the invention shown therein, the alternate swing arm shock mount, was first disclosed to it by Richardson. [64a].

These jury verdicts were supported by overwhelming evidence. Richardson and Cazort not only testified to the fact that they originated, conceived and disclosed to Suzuki Trade Secrets 5 and 6, but they produced written documentation to support their claim. Exhibit 200 [A1044-5] was Mr. Cazort's blueprint overlay, clearly showing the Full Floater connection, that was displayed to the Suzuki engineering group in Suzuki's California offices in early 1979.

Exhibits 6000-6003 [A1865; A1870-5; A1896-8] were pages from the notebook of one of Suzuki's engineers containing

notes of a meeting held in Japan on May 15, 1979, where Richardson was flown by Suzuki to discuss his patent and trade secrets with more Suzuki engineers. Those notes include three suspension drawings, two including the Full Floater modification. [A1870; A1873]. Suzuki went to extreme lengths to try to discredit this documentary evidence, which attempts backfired.[6]

In contrast, Suzuki had absolutely no physical or documentary evidence that supported its claim that its own engineers developed the Full Floater. In fact, Suzuki was unable to produce any drawings or other engineering work that preceded its Japanese patent application filed October 16, 1979. The Court of Appeals mentioned the significant fact that there was a complete absence of any supporting documentation on the part of the Suzuki-identified inventors. [42a].

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[6] Suzuki produced a witness who claimed that the size and content of Exhibit 200, the blueprint overlay, had "changed" since he first saw the document in April, 1980, which implied that the document was a fraud. Unfortunately for Suzuki, that witness was totally impeached by his earlier deposition testimony where he volunteered a description of Exhibit 200 which exactly matched the Exhibit 200 produced at trial by Richardson [A7667-9] and directly contradicted his trial testimony [A7636].

With respect to the Suzuki engineer's notebook recording the minutes of a Richardson conference in Japan, the original notebook was produced at trial with the most pertinent page erased and redrawn with the shock absorber position changed, a pivot removed, and marked with obliterating lines. [A1870]. When asked about these erasures, the Suzuki engineer to whom the notebook belonged testified that he did not know who had erased his drawings, but that he had first noticed the erasures about the same time the Exhibit 200 witness referenced above had shown up in Japan to examine the notebook. [A8416-23]. Unfortunately for Suzuki, a photocopy of the same notebook page before the alterations had been obtained years before in discovery and produced at trial. [A1313; A1316]. This unaltered photocopy, as well as another notebook page produced by Suzuki during discovery but uncovered by Richardson in the original notebook [A1873], substantiated Richardson's testimony of his disclosure of the Alternate Shock Mount (Trade Secret No. 6).

(7) Suzuki claims that the Richardson patent is invalid because the Downs patent prior art was "virtually identical" to Richardson's suspension. [Pet.4]. This is as accurate as saying that moldy bread is "virtually identical" to medical grade penicillin. Downs was lacking two critical elements of claim 9: a certain pivotal connection and the rising rate characteristic. The testimony cited by Suzuki in support of its "virtually identical" conclusion actually shows these significant differences from a patent standpoint.[7]

(8) Suzuki states that the technology of Trade Secrets 5 and 6 "had previously been disclosed in published materials." [Pet.11 n.4]. To the contrary, these were factual questions that Suzuki flatly lost with the jury.[8] [34a; 58a-60a].

(9) Suzuki claims it objected to the forms of special verdicts regarding assignment of the Tamaki patents. [Pet.10]. The cited record does not support this.

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[7] Mr. Goodman, the former Patent Examiner, who examined and allowed the Richardson patent application as filed, testified that "In claim 1 in Richardson it says the spring is pivoted to the frame. That is not the case in Downs. The spring is not pivoted at all." With respect to rising rate, he testified that there was no doubt about it -- Downs lacked rising rate. [A4630-1].

[8] Both Trade Secrets 5 and 6 were used in a linkage-generated rising rate single shock absorber suspension system. No. 6 had an indirect shock/frame connection (via the swingarm). Suzuki cites as its alleged "published materials" the prior art by Bolger [A1149] and Burness [A1168]. Bolger is a dual shock linkage system with a direct shock/frame connection. The article by Burness states on its face that it relates to extending conventional dual shock non-linkage geometry, and the linkages shown therein all involved dual shocks.

The jury was aware that Suzuki contradicted itself by taking these factual positions on Bolger and Burness. At another time and place, specifically before the United States Patent Office in 1982 and again in 1983 [A1642-3; A1670-1], Suzuki argued by affirmative representation (Bolger) and by omission (Burness) that this prior art was no bar at all to Suzuki's obtaining a patent on the alternate shock mount.

(10) Suzuki obtained approximately 14 continuances prior to trial [A569-74] and later caused multiple delays at the Court of Appeals level. This litigation is entering its tenth year. Richardson's patent expires in 1992.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

The threshold inquiry is whether the issues in this "routine commercial arrangement" [35a] are special or important[9] to anyone but the parties;[10] none of the classic reasons for a grant of certiorari are present. Secondly, it should be noted that Suzuki's claim that the Court of Appeals failed to consider significant issues is not factually correct. The Court of Appeals' lengthy opinion noted that "[b]oth sides have raised many points in their briefs, disputing most aspects of the proceedings. We have considered all arguments in reaching our conclusions." [46a]. Another factor militating against certiorari is the concurrence between the district court and the Court of Appeals on the issues of validity and infringement.[11]

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[9] Sup.Ct. Rule 17.1.

[10] *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923).

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head. *Id.* at 393 (Taft, Chief Justice).

[11] As was stated by this Court in *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938), in affirming the trial and appeals courts' holding that the patents in question were valid and infringed:

> Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. [Citations omitted]. Moreover, the decision on that point [acquiescence in patent infringement] rests on concurrent findings. They are not to be disturbed unless plainly

Suzuki refers [Pet.13] to other petitions from Federal Circuit decisions, citing only docket numbers. Such briefing practices have been criticized. *Warner Bros., Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1127, 11 USPQ2d 1272, 1278-79 (Fed. Cir. 1989). The increase in petitions is undoubtedly the result of the increased use of jury trials in patent cases in recent years since Chief Judge Markey reassured inventors of their Seventh Amendment right to a jury trial in *SRI Int'l v. Matsushita Elec. Co.*, 775 F.2d 1107, 1127-32 (Fed. Cir. 1985).

A. The Court of Appeals Properly Upheld the Jury's Special Verdicts That the Patent was Valid and Had Been Infringed.

Suzuki cites *Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809 (1986), for the proposition that the judgment of validity cannot stand. *Dennison* offers no support for Suzuki's position. In *Dennison*, the district judge sitting without a jury held certain claims invalid for obviousness. The Court of Appeals reversed as to validity without expressly applying Fed.R.Civ.P. 52(a). *Panduit Corp. v. Dennison Mfg. Co.*, 774 F.2d 1082 (Fed. Cir. 1985). This Court vacated the Federal Circuit's decision and remanded the case to the Court of Appeals for further consideration in light of Fed.R.Civ.P. 52(a). *Dennison*, 475 U.S. at 811. On remand, *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561 (Fed. Cir. 1987), a proper analysis was made, and numerous findings of the district court were identified as clearly erroneous. Dennison again petitioned for certiorari, which this Court denied, *Dennison Mfg. Co. v. Panduit Corp.*, 481 U.S. 1052 (1987). There is nothing in any of the foregoing to suggest that the Court of Appeals for the Federal Circuit has allowed its expertise over patents to "overwhelm" the deference to which "the original finder of fact" is entitled. The opinion in this

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without support. [Citations omitted]. There is evidence to support them. *Id.* at 178.

case was written by a member of the *Panduit* panel, undoubtedly familiar with *Panduit*'s impact.

Moreover, the Court of Appeals in the case at bar took note of the fact that the district court felt the jury's verdicts were "advisory" [10a; 11a; 13a] and, in addition to finding the verdicts supportable under the standard of review applicable to jury trials [16a; 18a; 24a], carefully analyzed and found no clear error in those district court determinations in favor of Richardson while expressly finding clear error in those rulings of the district court adverse to Richardson [16a; 20a-23a]. This careful approach, taken because of the district court's erroneous treatment of the jury as "advisory", doubly ensures that Suzuki has no entitlement to certiorari.

1. Rule 49(b) Is Not a Proper Basis for Review.

Suzuki's contention that Fed.R.Civ.P. 49(b) provides a basis for review on certiorari is not persuasive Rule 49(b) deals with general verdicts accompanied by interrogatories, not with special verdicts. Rule 49(b) provides actions available at the trial court level to resolve inconsistencies between the general verdict and the answers to the interrogatories, i.e., resubmissions to the jury or the grant of a new trial. [Pet.2-3]. This rule appears absolute; however, where a party accepts the jury verdict, does not request a resubmission or new trial on the basis of the asserted inconsistency, and on appeal to the appellate level does not assert Rule 49(b), he has waived that right.

When the special verdict responses were handed down, Suzuki did not object to the verdicts as inconsistent, did not request a new trial on that ground but allowed the jury to be discharged. The proper time for Suzuki to have objected to an ambiguous jury verdict was before the jury was discharged. *Stancill v. McKenzie Tank lines, Inc.*, 497 F.2d 529, 534-45 (5th Cir. 1974). Richardson, on the other hand, made appropriate motions while Suzuki did not. [20a].

Moreover, Suzuki did not assert a Rule 49(b) objection or cite that Rule before the Court of Appeals for the Federal Circuit. [20a]. This Court should treat such late-discovered "inconsistency" claim as waived by Suzuki.

Even assuming, arguendo, that the special verdicts in this case were, in fact, interrogatories, any inconsistency was properly reconciled by the Court of Appeals, in accordance with the Ninth Circuit rule: "When there is an inconsistency between a general verdict and a written interrogatory, if reasonably possible we resolve the inconsistency in favor of sustaining the judgment." *Los Angeles Nut House v. Holiday Hardware Corp.*, 825 F.2d 1351, 1353 (9th Cir. 1987). "On review, the Court of Appeals must uphold a jury verdict unless it is impossible 'under a fair reading' to harmonize the answers." *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9th Cir. 1987).

This is in accordance with the rule announced in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd.*, 369 U.S. 355 (1962), where this Court said:

> Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the 7th Amendment.[12]

The Court of Appeals properly resolved any perceived inconsistency in accordance with the authorities cited above. [20a].

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[12] *Id.* at 364. "[N]othing in the Seventh Amendment removes the duty of a trial judge to give proper instructions to a jury, or the duty of reviewing court to correct the trial judge's errors." *Id.* at 366 (Frankfurter, J., dissenting).

2. *The Jury's Special Verdicts for Richardson on the Issue of Validity Were Supported by the Evidence.*

Suzuki challenged validity of the '332 patent on multiple grounds, and lost on all with the jury. [19a-24a]. The district court agreed with the jury and also found independently that Suzuki had not carried its burden of proof on any ground. [A6253-4]. The Court of Appeals affirmed the district court's and the jury's findings of validity. At this point, Suzuki appears to have abandoned all grounds except obviousness.

Suzuki's claim that validity should be resolved in its favor because it has been improperly denied the benefit of two special verdicts on obviousness is erroneous.

The glaring flaw in Suzuki's argument is that it ignores special verdict 6(c), the dispositive obviousness special verdict. Suzuki had the burden of proof to prove invalidity by clear and convincing evidence which would be reflected by a "YES" response to special verdict 6(c). 35 U.S.C. 282. The jury was unable to render a unanimous response to special verdict 6(c). [51a]. This special verdict states in full:

> 6(c) In 1974, would a person of ordinary skill in the art, presented with the problem of developing an improved motorcycle suspension system, and being familiar with Downs, Warner, Tyrrell, and McLaren[13], but totally unaware of Richardson's solution, be led to do what Richardson disclosed and claimed in his patent?
>
> Jury Answer: NOT UNANIMOUS.

This is an accurate summary of the ultimate question of obviousness to be submitted to a jury. *In re Dow Chemical*, 837 F.2d 469, 471 (Fed. Cir. 1988); *Orthopedic Equipment Co. v. United States*, 702 F.2d 1005, 1013 (Fed. Cir. 1983). The

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[13] These are the four prior art references which Suzuki contended at trial invalidated the '332 patent.

Court of Appeals relied on the one actual dispositive jury finding [18a], which is totally consistent with the jury's finding of validity [52a], and did not merely "assume" the existence of such a finding.[14]

Suzuki argues in footnote 6, Pet.15, that the Court of Appeals ignored the jury's findings on "secondary considerations." This is an attempt to invert the burden of proof from Suzuki, who must prove invalidity, and place it upon Richardson to prove validity by proving existence of secondary considerations. *Graham v. John Deere, Co.*, 383 U.S. 1 (1966), does not hold that the lack of secondary considerations indicates invalidity. Rather the absence of secondary considerations is a neutral factor, and does not preclude a holding of non-obviousness because such evidence is not a requirement for patentability. *Custom Accessories v. Jeffrey-Allan Industries, Inc.*, 807 F.2d 955, 960 (Fed. Cir. 1986); *Medtronic Inc. v. Intermedics, Inc.*, 799 F.2d 734, 739 n. 13 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987).

On the commercial success issue, Richardson had requested that the jury be instructed in accordance with *Kansas Jack, Inc v. Kuhn*, 719 F.2d 1144, 1150-51 (Fed. Cir. 1983). The district court refused. The Court of Appeals decision lists many of the admitted facts that are properly to be considered indicia of commercial success under *Kansas Jack*. [7a-8a]. There was no evidence to the contrary; Suzuki's ads, [A1388-9; A1390; A1399], the trade journal reports [A1394-8; A1404-9], and sale of hundreds of thousands of Full Floater motorcycles speaks volumes. The Court of Appeals drew a correct conclusion from admitted facts and properly

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[14] The jury gave an affirmative answer to the special verdict question No. 8: "Under the facts and law as you believe that you understand them, do you find claim 9 of the Richardson patent [the claim in issue] to be valid?" The jury's "YES" response shows a total consistency between Suzuki's failure to carry its burden of proof to establish invalidity (special verdict 6(c)) and the jury's unequivocal statement that it believed the patent to be valid. This is bolstered by the trial court's concurrence that the patent is valid. [A6253-4].

disregarded the commercial success jury verdict which was the product of gross instructional error.[15]

3. The Special Verdicts Cited by Suzuki Were Not Dispositive of the Issue of Obviousness, Were Subordinate to the Special Verdict of the Jury That the Patent Was Valid, and Were Given Proper Consideration by the Court of Appeals.

Suzuki's argument that the jury's special verdicts 6(a) and part 2 of 6(b) are dispositive is sophistic. First, Suzuki has only quoted a portion of each special verdict. This is improper as misleading. The jury was not responding to the edited versions, but to the entire special verdicts in context. The complete special verdict 6(b) with the deleted portion restored in boldface states as follows:

> **6 (b) If a shock absorber were to be used within a spring, as in Richardson,** in 1974 would it have been obvious to one of ordinary skill in the art that the lower part of the spring should be on a pivot, as opposed to being held in a rigid manner as shown in Figures 1 and 6 of Downs?

The trial court insisted on giving this special verdict over the adamant objections of Richardson that the special verdict instructed the jury to dissect and recreate the Downs prior art using portions of the Richardson invention as a guide. [A5779-81; A5785]. This is directly contrary to basic legal principles: (a) it is improper to dissect the claim in issue; (b) it is improper to apply hindsight; (c) it is improper to

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[15]The jury requested a definition of "commercial success" during deliberations. [A6233]. Over Richardson's strenuous objections [A6237; A6240] and at Suzuki's urging [A6235], the district court instructed the jury that commercial success was measured by one factor and one factor only: increased sales of motorcycles attributable to the Full Floater suspension [A6237-9]. This was clear error. It turned this secondary consideration into a numerical inquiry of little significance in the context of this case because the Full Floater motorcycle was admittedly being offered for sale in a declining market. [A5475-6].

incorporate the inventor's modification into the prior art; and (d) it is improper to disregard portions of the prior art which teach away from the invention. *Graham*, *supra*, at 15-18; *Panduit*, *supra* at 1566-82; *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 1137-44 (Fed. Cir. 1985).[16] *Lindemann Maschinenfabrik GMBH v. American Hoist & Derrick Co.*, 730 F.2d 1452, 1462 (Fed. Cir. 1984). Hindsight analysis is improper in determining obviousness, since the statutory test is whether the subject matter as a whole would have been obvious at the time the invention was made. 35 U.S.C. 103. *In re Deminski*, 796 F.2d 436, 443 (Fed. Cir. 1986); *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044, 1051-54 (Fed. Cir. 1988).

Of course, a jury fed such hints, suggestions and clues would say that it was obvious. No reasonable person will admit not knowing an answer to a question suggesting the answer within it. This special verdict was fatally tainted as an inquiry on obviousness because it includes an instruction to the jury to dissect just one portion of the prior art and recreate the art following the Richardson teaching "as in Richardson." The answer to such a special verdict is not dispositive of any issue and therefore properly was of little significance to the Court of Appeals.[17]

In stating special verdict 6(d), Suzuki has again omitted significant portions of that special verdict in its petition. The full special verdict, with omitted portions reinserted in boldface, is as follows:

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[16] "When prior art references require selective combination by the court to render obvious a subsequent invention, there must be some reason for the combination other than the hindsight gleaned from the invention itself." *Interconnect*, *supra*, at 1143.

[17] "[T]he mere fact that the prior art could be so modified would not have made the modification obvious unless the prior art suggested the desirability of the modification." *In re Laskowski*, 871 F.2d 115, 117 (Fed. Cir. 1989).

6(d) Does Downs disclose (see particularly Figures 1, 6 and 2),[18] an alignment of the linkage that would produce a rising rate throughout the permitted movement of the linkage?

Jury Answer: NO.

If not, in 1974, would it have been obvious to a person of ordinary skill in the art that the Downs alignment of the linkage could be adjusted to produce a rising rate throughout the permitted movement or such linkage?

Jury Answer: YES.

Suzuki offers no argument justifying the correctness of this special verdict, which clearly dissected the claim and the prior art. It directed the jury to examine only those figures in the Downs patent which Suzuki had selected to analyze using its expert's assumptions, calculations and hindsight reasoning and then modify this to conform to the Richardson invention. This led to the erroneous conclusion that in retrospect, those portions bore similarities to the Richardson invention.

This special verdict also was provided to the jury over Richardson's strenuous objections. At the time the special verdicts were being discussed outside the presence of the jury, Richardson pointed out to the trial court that of the many causes of "rising rate", the Richardson patent claimed solely

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[18] To even use the old (England, circa 1916) Downs patent drawings at all, Suzuki's expert testified he selected Figure 6 because "it's the most similar to Richardson" [A4355], enlarged the drawings [A4289] by guessing the size of the wheel [A4289-90], assumed an angle of force [A4299], assumed the drawing showed a fully extended suspension [A4300], assumed certain angles [A4305-7], assumed a length of the swingarm [A4326-7], assumed a point of mechanical interference [A4325] and then disregarded certain portions of the drawings which did not fit these hypotheses as draftsman's error [A4347-9]. Further, Suzuki intentionally disregarded Figure 4 of Downs because it was not as similar to Richardson as Figure 6 [A4302-3].

a "linkage generated rising rate" made in conformance with claim 9. Richardson objected that if the special verdict was to be of use, the words "linkage generated" should be inserted before "rising rate" since that was the "rising rate" of significance. The court declined, stating that, "No, we've already talked about that. From this standpoint it doesn't make any difference whether it is linkage generated or not." [T2774-5].[19] In doing so, the district court emasculated claim 9. Therefore, special verdict 6(d), part 2 was not even inquiring about the invention in issue.

Thus, Suzuki failed to carry its burden of proving obviousness of the Richardson patent, as shown by the jury's lack of unanimity in responding to special verdict 6(c) and by the district court's indication that it felt the answer was "clearly no." Suzuki has demonstrated no factual or legal reason why its materially edited versions of flawed special verdicts should be given higher regard than two jury findings clearly indicating that the factual determinations of obviousness were made against Suzuki, or any reason why it is error to rely upon special verdict 6(c).

4. The Jury's Special Verdicts for Richardson on the Issue of Infringement Were Supported by the Evidence.

The jury found infringement by both of Suzuki-identified claimed infringing models M and C. Special verdicts 9(a) and 9 (b) both find infringement "with the rising rate", which was an essential novel element of the Richardson linkage of claim 9.[20] The Court of Appeals found ample evidence in the

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[19] These Transcript pages are included as Appendix J at 3a. This is done by Richardson to defend his verdict, judgment, and affirmance, not expand his recovery. *Granfinanciera S.A. v. Nordberg*, 109 S.Ct. 2782, 2788 (1989).

[20] By responding to special verdict 10 [53a-54a] the jury confirmed that they found and intended to find infringement.

record to support the jury's verdict of infringement and noted that:

> Structure corresponding to every element of every clause of claims 1 and 9 was identified by witnesses as embodied in the accused motorcycles. There was no real dispute that of the nine or eleven elements in these claims . . . all but one were literally present. [22a].

Suzuki makes much of the jury's "nods" in response to misguided questions by the district court [Pet.7, 8]. It is difficult to imagine the grant or denial of certiorari being determined by unspoken body language of trial jurors, or by the court reporter's attempt to reduce to text the visualization of reactions of unspecified jurors. Will "nods" suffice to overturn written special verdicts and written orders of court? Moreover, it should be remembered that at the time of the trial that the "nods" occurred, the jury was suffering under the misdefined and misused word "equivalent" and which the Court of Appeals found to be highly prejudicial to Richardson. [22a-24a].

It should also be noted that the district court refused to instruct the jury on the doctrine of equivalents, which Richardson had requested [A0826-29]. If the jurors looked "quizzical," it was because the district court was telling the jury their findings meant they could not find infringement, especially of something which the district court thought was a "minor" infringement. [24a-25a]. These errors of law were shown in the opinion of the Court of Appeals. [15a-16a; 19a-25a].

5. The Court of Appeals Properly Directed Assignment of the Tamaki Patents to Richardson.

The district judge improperly employed a clear and convincing burden in instructing the jury on the issue of whether Suzuki should assign the Tamaki patents to Richardson. [A9034-5; A9039; A9050-51]. This was clear error, and the jury's finding adverse to Richardson on sole

inventorship, when that admittedly did not occur, was thus immaterial in light of the jury's verdict for Richardson on the fraud issues produced by a correct burden of proof, namely, a preponderance standard.

The Court of Appeals was cognizant of the jury findings that Suzuki had stolen trade secrets, fraudulently induced Richardson to reveal his trade secrets by concealing the intent not to exercise any option, fraudulently concealed the fact it was developing its "Full Floater" with the intention of using Richardson's trade secrets in the Full Floater, and filed for the Tamaki patent with the knowledge that the invention asserted therein was first disclosed to it by Richardson. The Court of Appeals properly reconciled the apparent conflict by recognizing that the remedy of assignment of the Tamaki patents is a different question than the administrative correction of inventorship.

Since the Court of Appeals' reinstatement of the fraud verdict is not challenged by Suzuki in it's petition, and since the jury necessarily determined that Suzuki engaged in fraudulent activity whereby it gained from Richardson something which, in equity and good conscience, Suzuki ought not to retain, the assignment is proper. The jury's fraud verdict found facts which trigger equitable relief. Because Suzuki showed no circumstance justifying denial of such relief, the Court of Appeals properly exercised its jurisdiction to award the equitable relief which the district court erroneously refused because of its erroneous grant of the new trial. *Williams v. City of Valdosta*, 689 F.2d 964, 977 (11th Cir. 1982).

Ordering assignment of ownership of a patent on a purloined invention is a proper and appropriate remedy under these circumstances. MILGRIM, TRADE SECRETS, § 7.08[A][c], at 7-359-60; *De Long Corp. v. Lucas*, 176 F.Supp. 104, 134 (S.D.N.Y. 1959), *aff'd*, 278 F.2d 804 (2d Cir.), *cert. denied*, 364 U.S. 833 (1960); *Carter Products, Inc. v. Colgate-Palmolive Co.*, 230 F.2d 855, 865 (4th Cir. 1956). This is especially true where, as here, there was undisputed evidence

of a breach of confidence and a controlling contract that required Suzuki to return to Richardson all property if Suzuki did not exercise its option.[21] [A126-127].

Suzuki states that no theory of joint inventorship had been argued at the trial, and that such theory was only brought up by motion after the jury had been excused. [Pet.10]. Suzuki omits mention of the clear and uncontradicted testimony by Richardson and Cazort that Guy Cazort, Richardson's friend and colleague, had participated in the conception and disclosure of the Alternate Shock Mount. [A7056-63; A7208-12]. This evidence was noted by the Court of Appeals. [43a]. It was perfectly appropriate for the Court of Appeals to note this testimony in considering the meaning of special verdict H-1 in light of the specific jury findings of fraudulent appropriation of Richardson's invention (special verdict C-3). More importantly, the Court of Appeals recognized that "the force of special verdict C-3 is not diminished. This verdict was not challenged on appeal." [43a].

Suzuki's contention that the assignment of the Tamaki patents deprives Suzuki of due process borders on the absurd. The claim of assignment has been in issue since at least the filing of the First Amended Complaint in 1982. [A106; A116-17; A121]. Finally, it is not the Court of Appeals' fact-finding, but the jury's fact-finding, that justifies the assignment. "Based on the jury verdict, Richardson is entitled to ownership of the patents as against Suzuki." [44a].

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[21] *See, Winston Research Corp. v. Minnesota Mining & Mfg. Co.*, 350 F.2d 134 (9th Cir. 1965); *Becher v. Contoure Laboratories*, 279 U.S. 388 (1929), where Justice Holmes said "the subject matter of [respondent's] claim was an undisclosed invention which did not need a patent to protect it from disclosure by breach of trust." *Id.* at 391; and *see, Montecatini Edison, S.P.A. v. Ziegler*, 486 F.2d 1279, 1284 (D.C.Cir. 1973); *Pursche v. Atlas Scraper & Eng. Co.*, 300 F.2d 467, 484 (9th Cir. 1962).

B. The Court of Appeals' Reversal of the New Trial Order on Trade Secret Nos. 5 and 6 Was Justified.

Suzuki argues that in reversing the grant of a new trial on trade secrets, the Court of Appeals (1) improperly interfered with the trial court's discretion, (2) violated applicable Ninth Circuit jurisprudence, and (3) engaged in improper fact-finding.

1. There was No Improper Interference With the Trial Court's Discretion.

The clear weight of the evidence favored Richardson. There was ample testimony from Richardson and Cazort concerning their origination and disclosure of the trade secrets. [A1044-5; A1896; A1898; A6518-9; A7048-9; A7051]. There was a dearth of any evidence that Suzuki or the public knew of the trade secrets before they were conceived by Cazort and Richardson and disclosed to Suzuki. Without exception, Suzuki's evidence, obtained after combing the world for more than seven years, dealt only with twin-shock linkage systems, or non-linkage mono-shocks, or systems not involving a rising rate at all. See, *supra*, Respondent's Additional Statement of the Case, (8), at p. 7.

Suzuki argues that the district court's decision to disallow the trade secrets was based upon evidence of general knowledge or use. This is simply not correct. A reading of the district court's comments shows that when discussing Trade Secret No. 5, the district court was simply reciting its own erroneous view of the law of trade secrets, i.e. that the results of experimentation are not protectable as trade secrets, that there were no trade secrets because there was no "slavish copying" [A8813; A8838], and that Suzuki was under no contractual obligation to Richardson not to use the "best" information although received in confidence from Richardson. With respect to Trade Secret No. 6, the district court's reference to an "Exhibit D in the defendant's brief" at 71a is to a non-linkage mono-shock and the only evidence of its existence consisted of one blurry photograph. [A1103--top

motorcycle in lower picture]. This mono-shock was not even alleged to have any rising rate at all. Both a linkage and rising spring rate are elements of Richardson's Trade Secrets 5 and 6.

Suzuki obviously felt and the Court of Appeals noted that Trade Secret No. 6 was "considered sufficiently novel and valuable that Suzuki included it in a patent application filed in Japan and later in the United States." [34a]. The district court erroneously stated the law in its incorrect instructions and statements to the jury that Richardson could not claim as a trade secret something that Suzuki "could have" eventually discovered by its own efforts [27a] or something Suzuki did not "slavishly" copy. Such position was directly contra to California law. *By-Buk Co. v. Printed Cellophane Tape Co.*, 163 Cal.App.2d 157, 166 (1958) [holding the defendants could not use plaintiff's confidentially-disclosed trade secret "though they might in time have reached the same result by their own independent experiments or efforts."][22]

Despite such errors favoring Suzuki and prejudicing Richardson, the jury found for Richardson on the trade secrets at bar. The district court, employing its own erroneous legal reasoning, deemed the jury's conclusions insupportable and ordered a new trial. The Court of Appeals properly held this was an abuse of discretion.

2. The Court of Appeals Did Not Violate Applicable Ninth Circuit Jurisprudence.

Suzuki claims that the Court of Appeals for the Federal Circuit departed from the rule of deference accorded to trial court's new trial determination by the Ninth Circuit, which substantive and procedural law Suzuki urges should govern

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[22] *See also Sinclair v. Aquarius Elec. Inc.*, 42 Cal.App.3d 216, 222 (1974), citing *Graver Mfg. Co. v. Linde Co.*, 339 U.S. 605, 607 (1950).

because the trade secret issue was a substantive law field not assigned exclusively to the Federal Circuit.

This argument fails for a number of reasons. First, Suzuki has not shown that the law of the Ninth Circuit is different than that applied by the Federal Circuit below. The Federal Circuit in the decision below [35a] relied heavily on Ninth Circuit decisions, including several of the very cases Suzuki cites. [Pet.17]. The governing law of the Ninth Circuit was recently stated in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir.), *cert. denied*, 473 U.S. 908, *reh. denied*, 473 U.S. 926 (1984) where Chief Judge Browning reversed the district court's grant of a new trial, stating:

> Although the district court's ruling on the alternative motion for new trial involved the exercise of a measure of discretion, a stringent standard applies when the motion is based on insufficiency of evidence. A motion for a new trial may be granted on this ground only if the verdict is against the "great weight" of the evidence [citations omitted] or "it is quite clear that the jury has reached a seriously erroneous result." In this case, the jury's verdict, rather than being clearly contrary to the weight of the evidence, was a more-than-defensible resolution of a difficult issue. *Id.* at 1347.

Second, Suzuki's premise that the trial court's new trial order was based on several grounds and all were not found unreasonable by the Federal Circuit, is fallacious: the district court did not base its new trial order on any grounds.

To the extent Fed.R.Civ.P. 7(b) governs, requiring Suzuki's motion for a new trial to state with particularity the grounds therefor, that motion is not part of the record on appeal, and cannot be considered.[23] If the district court's ruling is considered as given under Fed.R.Civ.P. 59(d), "the court shall

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[23] "This Court must affirm or reverse upon the case as it appears in the record." *Russell v. Southard*, 12 How. 139, 158-159 (1851).

specify in the order the grounds therefor", which was not done.[24]

The operative order is not the rambling and provisional colloquy of the May 11, 1987 transcript [A9073-A9121], but the "Order re Post-Trial Motions" signed by the district court on May 28, 1987, entered May 29, 1987 [A27-30], certified by the district court and the Court of Appeals under 28 U.S.C. 1292(b) [74a-76a; 77a-81a]. Every judgment shall be set forth on a separate document. Fed.R.Civ.P. 58. "The Rule 58 requirement also makes clear that oral statements, until embodied in a writing, are not final judgments." 10 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE, p. 17; *Pure Oil Co. v. Boyne*, 370 F.2d 121, 122-23 (5th Cir. 1966).

Even in its oral colloquy, the district court did not say the verdict was against the great weight of the evidence, or that the damages were excessive, or that the trial was not fair, or that there was a substantial error of law in the admission or excluding of evidence, or that a new trial was required to prevent injustice, or that there was newly discovered evidence, or that the conduct of court or counsel had tainted the verdict, or that a gross injustice would result if a new trial were not granted. In fact, it recited none of "the reasons for which rehearings have heretofore been granted in action at law in the courts of the United States." Fed.R.Civ.P. 59(a).

What the district court did do was draw contradictory inferences and express doubts about the correctness of the verdict that Nos. 5 and 6 were trade secrets, clearly basing those doubts on its erroneous views of the law. [70a-71a]. This was not the proper function of the district court. *Tennant v. Peoria & Pelom Union Ry. Co.*, 321 U.S. 29, 35 (1944). The district court's many statements cited by the Court of Appeals revealed the district court's lack of comprehension of the correct law of patents and trade secrets and its erroneous application of the law. [27a-37a]. Thus, no

rights under the Seventh Amendment[25] were implicated by the reversal of the new trial order by the Court of Appeals.

Third, even if the Ninth Circuit had a different rule respecting the deference to be accorded to granting a new trial by a trial judge, and even if the oral colloquy between the district court and counsel is given effect as a statement of grounds on which the new trial grant was based, Suzuki has failed to demonstrate an error of any kind, much less make a case for the granting of certiorari.

The existence of a confidential relationship was undisputed. There was absolutely no evidence that Richardson did not develop the trade secrets and provide them to Suzuki, or that they were not competitively useful to Suzuki. The jury had before it the contract between the parties [A1058-67], the admitted fact that the earliest written record Suzuki had concerning its Full Floater suspension system was October, 1979 [A800; A7731-3], (well after Richardson's disclosure) and Suzuki's secret removal and examination in Japan (without Richardson's consent) of the only item (the special shock absorber) Suzuki knew it was not allowed to freely examine [A6356, Para. 26, 27], plus the uncontested and compelling fact that Suzuki applied for a Japanese patent [A6357-8] and obtained a United States patent [A799; A1550; A1597; A1640-43; A1668-71] on the same technology.

If the novelty of disclosed information is sufficient to support patentability, a fortiori, it is adequate to constitute a trade secret, since the novelty required for the latter is less than that required for patentability. See, *Carter Products*,

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[25] "There is no Seventh Amendment problem, however, if the appellate court reverses the trial court's grant of a new trial In this instance the appellate court is not reexamining facts found by a jury but is reinstating the jury's findings as against the contrary findings of the judge. Appellate action in this context protects the role of the jury, as envisioned by the Seventh Amendment, rather than running contrary to it." 11 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE, p. 126.

supra, at 572-574. The Court of Appeals here considered all of the above arguments. [46a].

28 U.S.C. 1338(b) is as effective as 28 U.S.C. 1338(a) in vesting in the district court original jurisdiction of Richardson's claims since a claim of unfair competition by reason of misappropriation of trade secrets is joined with Richardson's "substantial and related claim" arising under the patent laws. Such joinders are encouraged by the federal rules. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966). Since 28 U.S.C. 1295 gives the Federal Circuit jurisdiction of an appeal from a final judgment of a district court whose jurisdiction was based, in whole or in part, on 28 U.S.C. 1338 (*Atari, Inc. v. JS & A Group*, 747 F.2d 1422, 1430 (Fed. Cir., *en banc*, 1984)), then logically the Federal Circuit -- and not the Ninth Circuit -- would be the circuit whose procedural law would govern.

3. The Court of Appeals Did Not Engage In Improper Fact-Finding.

If the "oral decision" of the district court in this case is to be considered as stating any ground, that ground was that the district court considered the jury's verdict on trade secrets as unsupported by the evidence. This entitled the Court of Appeals, in determining whether an abuse of discretion had occurred, to review the record to determine whether the district court had made an error of law, a clear error of judgment, or findings which were clearly erroneous. To ensure against the danger that the jury's verdict might be lightly disregarded by the trial judge, "a stringent and searching review of the record is undertaken on appeal." *J & H Auto Trim Co., Inc. v. Bellefonte Ins. Co.*, 677 F.2d 1365, 1373 (11th Cir. 1982); *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360, 362-63 (5th Cir. 1980). Such a review was undertaken by the Court of Appeals, not as a fact-finder, but as a finder of abuse of discretion.

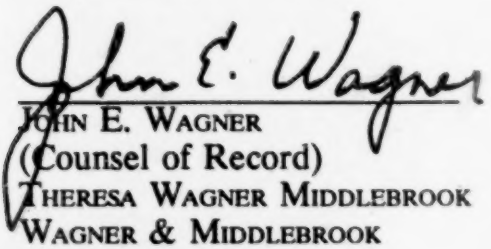
The Court of Appeals did not violate any precepts of deference to the fact-finder; instead, it upheld the sanctity of

the jury system by restoring Richardson's trade secret verdicts which the district court had taken away by errors of law amounting to abuse of discretion.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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APPENDICES

APPENDIX I

Statutory Provisions Involved

28 U.S.C. 1292 (b)

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. 1338 (b)

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws.

35 U.S.C. 282
PRESUMPTION OF VALIDITY

The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting it . . .

F.R.Civ.Rule 49
Special Verdicts and Interrogatories

(a) SPECIAL VERDICTS. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in doing so the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgement on the special verdict.

APPENDIX J

Hearing on Instructions Transcript
2774:20-2775:5

MS. MIDDLEBROOK: I think "linkage-generated" should be before "rising rate" also.

MS. OSINSKI: Did you catch that?

MR. ROCKWELL: No.

MS. OSINSKI: "Linkage-generated" before "rising rate."

THE COURT: No, we've already talked about that. From this standpoint it doesn't make any difference whether it is linkage-generated or not.

MS. MIDDLEBROOK: Your honor, I object. I believe it would.